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In the Supreme Court of the United States

OCTOBER TERM, 1991

HUGHES ANDERSON BAGLEY, JR., PETITIONER

v.

CMC REAL ESTATE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT PRINS IN OPPOSITION

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QUESTION PRESENTED

After petitioner was convicted for federal narcotics violations, he learned that, contrary to the information he had received in response to his pre-trial discovery motion, two of the government's principal witnesses had received compensation for their assistance in the investigation that led to his indictment.

The question presented is whether petitioner's claims for damages under 42 U.S.C. 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on the government's withholding of witness information accrued when he first learned of the witnesses' false statements or when his conviction was later reversed because the withholding of the information was found to be prejudicial error.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 923 F.2d 758. The decision of the district court adopting the report and recommendation of the magistrate (Pet. App. 16a-33a) is unreported. Pet. App. 14a-15a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on January 22, 1991. A petition for rehearing was denied on June 3, 1991 (Pet. App. 34a-35a). On September 4, 1991, Justice

O'Connor extended the time for filing a petition for a writ of certiorari to and including September 30, 1991, and the petition was filed on September 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1977, respondent Mitchell, a state law enforcement officer employed by respondent Chicago, Milwaukee, St. Paul & Pacific Railroad Company as a security officer, assisted respondent Prins, an agent for the Bureau of Alcohol, Tobacco and Firearms (BATF), in conducting an undercover investigation of petitioner. After a trial in which respondent Mitchell testified against him, petitioner was convicted in 1977 of violating federal narcotics laws. Pet. App. 2a-3a.

In response to petitioner's pretrial discovery motion, the government furnished petitioner with Mitchell's sworn statement that he had received no compensation for his assistance in connection with petitioner's prosecution. In May 1980, as a result of requests for information under the Freedom of Information Act and the Privacy Act of 1974, 5 U.S.C. 552, 552a, petitioner learned that Mitchell's sworn statements were false: respondent Mitchell had entered into a written agreement with the BATF to receive compensation for his assistance in the investigation. Pet. App. 3a.¹

¹ James O'Connor also participated in the investigation that led to petitioner's 1977 conviction, and, like Mitchell, signed statements indicating that he had neither received nor expected to receive compensation for his services. Although petitioner named O'Connor as a defendant in this case, he was never able to locate O'Connor and, thus, was unable to

b. The district court denied petitioner's application under 28 U.S.C. 2255 to vacate his narcotics conviction, ruling that the government's withholding of the information concerning witness compensation was harmless error. The court of appeals reversed. Following a remand from this Court, see *United States v. Bagley*, 473 U.S. 667 (1985), the court of appeals, on September 2, 1986, again reversed petitioner's 1977 conviction, finding that the error was not harmless. *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986).

2. a. On August 18, 1988, petitioner filed suit against respondents under 42 U.S.C. 1983 and 1985, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they had conspired to violate his constitutional rights to due process and to confront the witnesses against him. He requested damages of \$100,000,000. Pet. App. 3a-4a. Respondents Mitchell and Prins moved for judgment on the pleadings, arguing, *inter alia*, that the action was barred by the statute of limitations and that the complaint failed to state a cause of action under Section 1985. *Id.* at 4a.

A United States magistrate recommended that judgment be entered in favor of all respondents. He found that petitioner's claims had accrued in 1980, when he learned that respondent Mitchell's statements were false, and were therefore time-barred under the applicable three-year state statute of limitations. Pet. App. 27a. The magistrate rejected petitioner's argument that the statute of limitations was tolled during the pendency of his Section 2255 motion. He concluded, however, that because petitioner was

serve him. Pet. App. 2a-4a. Hence, O'Connor is not a party before this Court.

imprisoned at the time his cause of action accrued, the limitations period did not begin to run under state law until he was released. Pet. App. 27a. Since petitioner was paroled in 1982 and did not file suit until 1988, his claims were still time-barred.² *Ibid.* The district court subsequently adopted the magistrate's report and recommendation. *Id.* at 14a-15a.

b. The Ninth Circuit affirmed. Noting that "there appear to be no cases holding that a civil rights claim does not accrue until habeas corpus proceedings have ended," Pet. App. 8a, the appellate court held that petitioner's "section 1983 and *Bivens* actions accrued for statute of limitations purposes when he first learned of the injury giving rise to his claims, and not at the completion of his habeas corpus proceeding." *Ibid.* Agreeing with the district court, the appeals court concluded that, under state law, the limitations period was tolled while petitioner was imprisoned. Thus, it began to run on July 9, 1982 and ended on July 9, 1985. Since petitioner did not file suit until 1988, his suit was time-barred. *Id.* at 9a.

The court of appeals concluded that its holding was consistent with the purposes of statutes of limitations, observing that, while petitioner "knew of his claim eight years before he filed it," none of the respondents knew that petitioner "contemplated bringing a claim against them." Hence, respondents could "take no steps to preserve evidence" and "the likelihood of their being prejudiced by the delay is great." Pet. App. 9a. The court of appeals rejected petitioner's argument that judicial economy would be served by delaying the

² The magistrate also concluded that petitioner had failed to state a cause of action under 42 U.S.C. 1985. Pet. App. 31a. That ruling was affirmed on appeal, *id.* at 13a, and is not now before this Court. Pet. 5.

filing of civil rights complaints until after resolution of the habeas corpus proceedings, at which time the petitioner would know whether his conviction ultimately would stand. The court suggested that "[t]he judiciary can economize its resources by staying the civil rights action until habeas proceedings are complete." Moreover, the court explained, petitioner's approach "might extend limitations indefinitely, since habeas petitions are free of limitations." *Ibid.*

The court also rejected petitioner's argument that, until his conviction was ultimately reversed, he "could not possibly have brought his civil rights action" because he was collaterally estopped from claiming constitutional injury by the district court's ruling that the withholding of witness information was "harmless error." The court observed that the issue in the civil rights action was "different from the issues presented in [petitioner's] criminal trial," explaining that petitioner's civil rights claim "would not be totally defeated even if the officer's misconduct was harmless in his criminal trial." Pet. App. 10a. In any event, the court concluded, petitioner could have filed within the limitations period and then "asked the court to stay that action pending the outcome of his habeas petition." Upon reversal of his conviction there would be "no collateral estoppel effect." *Ibid.*

ARGUMENT

The court of appeals' decision is correct, and is fully consistent with the decisions of this Court and other courts of appeals. No further review is warranted.

1. State statutes of limitations and state tolling rules apply to actions brought under 42 U.S.C. 1983 unless "inconsistent with the federal policy underlying the cause of action under consideration," *Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980), but federal law governs when the cause of action accrues. *Norco Constr., Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986). The courts of appeals have applied the same rule to *Bivens* actions. See, e.g., *Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989); *Spina v. Aaron*, 821 F.2d 1126 (5th Cir. 1987).

As petitioner concedes (Pet. 8), "this Court has never squarely addressed the issue of whether a civil rights claim based on an unconstitutionally obtained criminal conviction can or does accrue before the conviction is vacated." However, this Court has implied that a defendant can maintain a civil rights action for damages stemming from his conviction and incarceration before exhausting all available avenues for challenging that conviction. In *Wolff v. McDonnell*, 418 U.S. 539, 554-555 (1974), this Court stated that a state prisoner's action for damages under Section 1983 based on the denial of good-time credits would be "properly before the District Court" while the prisoner was seeking restoration of good-time credits in parallel state proceedings. That statement is inconsistent with petitioner's position that a cause of action for deprivation of constitutional rights in connection with a criminal prosecution does not accrue

until such time as the conviction is reversed on review.³

Several courts of appeals have explicitly or implicitly rejected petitioner's position as well. See, *e.g.*, *Mack v. Varelas*, 835 F.2d 995, 1000 (2d Cir. 1987) (Section 1983 action against sheriff for failure to produce witness at trial accrued when defendant was incarcerated following conviction, not at completion of appellate and habeas proceedings); *Bailey v. Ness*, 733 F.2d 279, 280 (3d Cir. 1984) (rejecting the contention that "until such time as the state appellate court rule[s] that [the prosecuting attorney's] allegedly prejudicial conduct violated [the defendant's] constitutional rights," an action for damages under Section 1983 "could not be maintained" and "must be

³ The Court had previously ruled, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), that, when a state prisoner seeks only to void or shorten his term of imprisonment, his sole federal remedy is a writ of habeas corpus—which requires that he first seek relief in a state forum—rather than a suit under 42 U.S.C. 1983, which imposes no requirement that state remedies be exhausted. The Court stated in *Preiser*, however, that "[i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release." In that case, "habeas corpus is *not* an appropriate or available federal remedy." 411 U.S. at 494.

The clear implication of that statement is that a prisoner can maintain a cause of action under Section 1983 stemming from an unlawful conviction before exhausting all avenues for challenging the conviction. That premise also underlies the Court's observation in dictum in a later opinion that it had not yet resolved the question of whether "a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Tower v. Glover*, 467 U.S. 914, 923 (1984).

dismissed"); *Richardson v. Fleming*, 651 F.2d 366, 372-373 (5th Cir. 1981) (in suggesting that district court should stay civil rights action pending resolution of state and federal habeas proceedings, implying that statute of limitations might otherwise accrue and run before all avenues for review of criminal conviction were exhausted); *Young v. Kenny*, 907 F.2d 874, 876-878 (9th Cir. 1990) (reasoning that, because the limitations period on a section 1983 claim may expire before completion of all state appellate and federal habeas review, civil rights action should be stayed rather than dismissed pending those procedures), cert. denied, 111 S. Ct. 1090 (1991).

2. Contrary to petitioner's suggestion (Pet. 14), there is no conflict between the Fifth Circuit's decision in *Prince v. Wallace*, 568 F.2d 1176, 1178 (1978), and this case. In *Prince*, after the defendant's writ of habeas corpus was granted, he filed suit against the state prosecutor under 42 U.S.C. 1983 alleging a deprivation of his right to a speedy trial. In a per curiam opinion, the court of appeals upheld the dismissal of the action on the grounds both that the statute of limitations had expired and that the prosecutor enjoyed absolute immunity. In addressing the statute of limitations issue, the court stated that the cause of action did not accrue until the date that the State's application to this Court for reconsideration of the petition for writ of certiorari to review the grant of habeas relief was finally denied.

The court's statement on this issue was dictum: its decision to dismiss the action did not depend on whether the cause of action accrued at that point or earlier, since, in either event, the action was untimely. 568 F.2d at 1178. Moreover, the court's determination that the action was out of time was not essential to its decision; dismissal was also required because

the prosecutor had absolute immunity. Finally, the Fifth Circuit's discussion of accrual in *Prince* is at odds with its more recent decision in *Richardson v. Fleming*, 651 F.2d at 373, in which the court specifically instructed the district court on remand to have "due regard" for the state statute of limitations applicable to the defendant's Section 1983 claim in deciding whether to dismiss it without prejudice or to stay the action pending completion of state and federal review of his conviction. Those instructions are inconsistent with the position that a Section 1983 action stemming from a criminal prosecution does not accrue while the resulting conviction is still under review. See also *Conner v. Pickett*, 552 F.2d 585, 587 & n.1 (5th Cir. 1977) (suggesting that Section 1983 action be stayed rather than dismissed pending outcome of state criminal proceedings).⁴

⁴ Petitioner also asserts (Pet. 13-14) that there is a conflict between the court of appeals' decision in this case and *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir.), cert. denied, 429 U.S. 855 (1976). In *McNally*, the court denied the defendant monetary relief under *Bivens* for an alleged violation of his right to a fair trial. The court did not address the statute of limitations or the accrual of the defendant's *Bivens* claim. It rested its decision, instead, on collateral estoppel principles, holding that the plaintiff could not relitigate the issue of the fairness of his trial in civil proceedings since that issue was decided adversely to him in his trial and appeal. This case does not present any issue of collateral estoppel, since, as the court of appeals recognized, "[o]nce [petitioner's] conviction was reversed, there could have been no collateral estoppel effect of any kind on his civil rights claims." Pet. App. 10a.

Relying on *Allen v. McCurry*, 449 U.S. 90 (1980), petitioner argues (Pet. 18-19) that, because a defendant would be collaterally estopped by an adverse ruling in his criminal case from proving the constitutional "injury" that would entitle

3. a. In arguing (Pet. 9) that the court of appeals' decision is inconsistent with *United States v. Kubrick*, 444 U.S. 111, 122 (1979), petitioner mischaracterizes the Court's decision in that case. In *Kubrick*, this Court held that a malpractice claim does not accrue when a plaintiff becomes aware "that his injury was negligently inflicted," 444 U.S. at 120, but as soon as the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury." *Id.* at 122. Thus, contrary to petitioner's assertion (Pet. 9), the *Kubrick* Court did *not* distinguish between a potential malpractice plaintiff's "knowledge of the facts" underlying his cause of action, and knowledge of "the extent of his injury." Rather, the

him to relief under Section 1983 or *Bivens*, his cause of action does not exist—and hence does not accrue—unless, and until, his criminal conviction is overturned. Petitioner's argument is fallacious. Collateral estoppel is a *defense* to a cause of action; the availability of a collateral estoppel defense has no bearing on the existence of a cause of action and the timing of its accrual. Thus, assuming that collateral estoppel would apply, the resolution in criminal proceedings of issues bearing on an individual's claim of constitutional violation would, at most, affect the outcome of a subsequent civil rights action arising from those proceedings; it would not determine whether the defendant has alleged facts which, if proved, would amount to a deprivation of his constitutional rights. The proper response to the possibility that a non-final criminal conviction might have a collateral estoppel effect in a pending civil rights action (or that the civil adjudication might bar an inconsistent holding in a subsequent review of the conviction), see, *e.g.*, *Bailey v. Ness*, 733 F.2d at 281, is not dismissal of the action for failure to state a claim; some courts have stayed these lawsuits until the claimant's criminal conviction is no longer under review. See *id.* at 282-283; *Richardson v. Fleming*, 651 F.2d at 374-375; *Young v. Kenny*, 907 F.2d at 876-878.

Court recognized that a malpractice plaintiff will only have sufficient “knowledge of the facts” to bring an action when he becomes aware that he has suffered medical injury. At that point, “armed with the facts about the harm done to him,” he can “protect himself by seeking advice in the medical and legal community” as to whether that injury was negligently inflicted. *Kubrick*, 444 U.S. at 123.

According to petitioner, *Kubrick* provides support for the proposition that his civil rights claims did not accrue until his conviction was reversed on collateral attack. Until the final disposition on review, he argues, a civil rights plaintiff cannot “know” whether he has suffered constitutional injury—and may ultimately be shown to have suffered none.

The fallacy of this argument is that it equates knowledge of “injury” as used in *Kubrick*—which denotes awareness of bodily harm—with knowledge of “legal injury” in the context of a civil rights action—that is, knowledge of whether the government official in fact violated petitioner’s constitutional rights. As the opinion in *Kubrick* makes clear, that analogy is false. The Court in *Kubrick* distinguished plaintiff’s awareness “that he has been hurt”—that is, that he suffered medical harm—from his knowledge that he “has been wronged”—that is, that the “injury” that he suffered was tortiously inflicted. The plaintiff’s knowledge of his medical injury had nothing to do with whether he knew himself to be the victim of medical negligence. See 444 U.S. at 122, 124.

Similarly, in this case, it was not necessary for petitioner definitively to establish that the harm he suffered was of constitutional dimension—and that he would, for that reason, ultimately prevail on his legal claim—in order to be in a position to bring a

claim for the alleged violation. Petitioner was "armed with the facts about the harm done to him," 444 U.S. at 123, and possessed all information necessary to state his claim, when he learned, following his conviction, that evidence had been withheld. Petitioner was plainly aware of the "critical" facts in 1980: he knew that he had been unable adequately to cross-examine the government's witnesses because he had not known that they had been paid, and that he was subsequently convicted and incarcerated.

b. The court of appeals' decision is also not in conflict, as petitioner alleges (Pet. 8-9), with *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson*, this Court held that a land developer has no "taking" claim under the Fifth Amendment until the government makes a final decision regarding the developer's right to exploit the property. The Court explained that the Fifth Amendment is not actually violated until "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 193. *Williamson* is fully consistent with the court of appeals' decision in this case. The constitutional violation alleged by petitioner occurred when the "initial decisionmaker" decided to provide false information. Although the extent of the damages that might arise out of that injury was not definitively established, the constitutional violation was certainly "final" within the meaning of *Williamson* because, at that point, the government agents had committed the acts that petitioner claims violated his rights under the Constitution.

4. Because a motion for habeas corpus relief under 28 U.S.C. 2255 "may be made at any time," petitioner's argument as to when a cause of action ac-

crues would, in practice, result in an indefinite postponement of *Bivens* and Section 1983 claims without any notice to the potential defendants. This, in turn, would lead to the litigation of a great many claims after the relevant evidence and witnesses have disappeared. Such a result would utterly defeat the purpose of statutes of limitations, which is primarily to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. at 117; see also *Board of Regents v. Tomanio*, 446 U.S. at 487.

If, on the other hand, petitioner had brought his action in a timely fashion, respondents would have had notice of the claim pending against them. The court could have decided whether the claim was so patently frivolous as to warrant outright dismissal or whether the claim, even if not frivolous, was nevertheless subject to a dispositive defense independent of the existence of the conviction. See, e.g., *Siegert v. Gilley*, 111 S. Ct. 1789 (1991) (no clearly established constitutional right); *Burns v. Reed*, 111 S. Ct. 1934 (1991) (state prosecutorial immunity); *Briscoe v. LaHue*, 460 U.S. 325 (1983) (witness immunity). In addition, the court could also consider the option of staying the proceedings or dismissing without prejudice to refiling upon completion of the habeas proceedings. See note 4, *supra*; see also *Bailey v. Ness*, 733 F.2d at 282-283; *Richardson v. Fleming*, 651 F.2d at 372-375; *Young v. Kenny*, 907 F.2d at 876-878. Petitioner's failure timely to file his claim precluded the district court from considering any of these options.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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